

Neuro Affiliates Company, A Joint Venture Between American Psychiatric Hospital of California and N.P.H.S. d/b/a Woodview Calabasas Hospital and Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO. Case 31-CA-10342

August 3, 1981

DECISION AND ORDER

Upon a charge filed on August 20, 1980, by Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Neuro Affiliates Company, A Joint Venture Between American Psychiatric Hospital of California and N.P.H.S. d/b/a Woodview Calabasas Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on September 16, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 8, 1980, following a Board election in Cases 31-RM-625 and 31-RD-528, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about August 13, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 24, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and stating certain affirmative defenses.

On January 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 3, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show

Cause why the General Counsel's Motion for Summary Judgment should not be granted.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its motion in opposition to the General Counsel's Motion for Summary Judgment, Respondent admits that it has refused, and that it continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate. Further, in its answer to the complaint, Respondent admits that the Union is the exclusive representative for the purposes of collective bargaining of the employees in the unit found appropriate, and, by virtue of Section 9(a) of the Act, is the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. However, notwithstanding its admission in this latter regard, Respondent in its answer to the complaint raises the "affirmative defenses" that the Board erred in its findings of fact and conclusions of law regarding certain challenged ballots that were determinative in the election results and therefore resulted in the Board's *improper* certification of the Union for the bargaining unit found appropriate herein. Moreover, Respondent in its subsequent motion in opposition to the General Counsel's Motion for Summary Judgment now denies that the Union is the exclusive representative for the purposes of collective bargaining of the employees in the unit found appropriate, again asserting that the Board's certification of representative was improper inasmuch as it was based upon what Respondent contends was the Board's erroneous ruling upholding the Hearing Officer in his report on challenged ballots.

The General Counsel argues that all issues raised by Respondent in this proceeding were carefully investigated, fully considered, and finally resolved in the underlying representation proceeding. The General Counsel further argues that no special circumstances exist, and that none have been raised by Respondent, which would require a reexamination of the underlying representation proceeding. Finally, the General Counsel asserts that, Respondent having admitted that the Union requested it to bargain and that Respondent refused the Union's request, there are no litigable issues remaining which would warrant a hearing. We agree with the General Counsel.

Review of the record herein, including the record in the representation proceeding, Cases 31-

¹ Official notice is taken of the record in the representation proceeding, Cases 31-RM-625 and 31-RD-528, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

RD-528 and 31-RM-625, establishes that pursuant to a Stipulation for Certification Upon Consent Election, approved by the Regional Director for Region 31 on June 21, 1978, an election was conducted on July 12, 1978. The tally was 33 votes for, and 45 votes against, the Union, with 30 challenged ballots, a sufficient number to affect the results of the election. Thereafter, on September 28, 1978, the Regional Director for Region 31 issued a report on the challenged ballots, in which he recommended that 5 of the challenges be sustained, 17 be overruled, and the remaining 8 be resolved at a hearing, if after opening and counting the 17 overruled challenged ballots the revised tally of ballots showed that the 8 were determinative.

Subsequently, Respondent filed exceptions to the Regional Director's report on the challenged ballots. Therein Respondent contended, *inter alia*, that the Regional Director erred in overruling the challenge to the ballot of employee Moers, on the grounds, as found by the Regional Director, that Moers was properly includable in the unit.

On March 8, 1979, the Board issued its Decision and Direction in which it adopted the Regional Director's recommendations in his report on the challenged ballots, except that the Board added the ballot of employee Moers to the group of challenged ballots to be resolved at a hearing.

On March 15, 1979, the challenged ballots which were overruled were opened and counted pursuant to the Board's Decision and Direction, and a revised tally of ballots was issued, showing 45 votes for, and 48 votes against, the Union, with 9 remaining undetermined challenged ballots, a sufficient number to affect the results of the election.

Thereafter, on March 20, 1979, Respondent timely filed objections to the revised tally of ballots. Subsequently, on April 4, 1979, the Acting Regional Director for Region 31 issued his Report on Objections and Notice of Hearing on Challenges, in which he recommended that Respondent's objection to the Board agent's voiding of a ballot be sustained, and that the ballot be counted as a "No" vote against the Union. Thereafter, on May 2, 1979, by direction of the Board, the Deputy Executive Secretary of the Board issued an Order adopting the Acting Regional Director's recommendations and ordered that the revised tally of ballots be further revised to show 45 votes for and 49 votes against the Union, with 9 remaining undetermined challenged ballots, a sufficient number to affect the results of the election.

A hearing on the challenged ballots was conducted during May 1979, and on December 31, 1979, Hearing Officer Paula I. Paley issued her report on the challenged ballots, in which she rec-

ommended that the challenges to three ballots be sustained and that the challenges to the remaining six ballots be overruled, that those ballots be opened and counted, and that an appropriate certification be issued. Thereafter, on January 10, 1980, Respondent filed exceptions to the Hearing Officer's report on the challenged ballots.

On July 16, 1980, the Board issued its Supplemental Decision and Direction to open and count the challenged ballots, in which it adopted the Hearing Officer's findings and recommendations, and directed that the Regional Director open and count the ballots of employees Bogert, Holcomb, Klein, McElroy, Wissusik, and Moers, prepare and serve on the parties a revised tally of ballots, and issue an appropriate certification.

On July 30, 1980, the aforementioned six ballots were opened and counted pursuant to the Board's Supplemental Decision and Direction, and a corrected revised tally of ballots was issued, showing 51 votes for, and 49 votes against, the Union. Subsequently, on August 8, 1980, the Regional Director for Region 31 issued a Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the employees in the unit in question.

In its motion in opposition to the General Counsel's Motion for Summary Judgment, Respondent renews the contentions it earlier put forth in support of its exceptions to the Regional Director's report on the challenged ballots, with regard to the ballot of employee Moers, and raises contentions in support of its earlier exceptions to the Hearing Officer's report on the challenged ballots, with regard to the ballots of employees Bogert, Holcomb, Klein, McElroy, and Wissusik, as well as Moers.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, a joint venture of American Psychiatric Hospital of California and N.P.H.S. d/b/a Woodview Calabasas Hospital, with an office and principal place of business located in Calabasas, California, where it is engaged in providing mental health care. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California, and annually derives gross revenues in excess of \$250,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

Unit clerical assistants, psychiatric aides, certified occupational therapist assistants, licensed vocational nurses, dietary employees, house-keeping employees, licensed psychiatric technicians, and maintenance employees; excluding business office clericals, teachers, marriage and family counselors, licensed clinical social workers, medical records clerks, professional employees, registered nurses, guards and supervisors as defined in the Act.

2. The certification

On July 12, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as

their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on August 8, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 30, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 13, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 13, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent com-

mences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Neuro Affiliates Company, A Joint Venture Between American Psychiatric Hospital of California and N.P.H.S. d/b/a Woodview Calabasas Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Unit clerical assistants, psychiatric aides, certified occupational therapist assistants, licensed vocational nurses, dietary employees, housekeeping employees, licensed psychiatric technicians, and maintenance employees; excluding business office clericals, teachers, marriage and family counselors, licensed clinical social workers, medical records clerks, professional employees, registered nurses, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 8, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 13, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Neuro Affiliates Company, A Joint Venture Between American Psychiatric Hospital of California and N.P.H.S. d/b/a Woodview Calabasas Hospital, Calabasas, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

Unit clerical assistants, psychiatric aides, certified occupational therapist assistants, licensed vocational nurses, dietary employees, housekeeping employees, licensed psychiatric technicians, and maintenance employees; excluding business office clericals, teachers, marriage and family counselors, licensed clinical social workers, medical records clerks, professional employees, registered nurses, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Calabasas, California, facility copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employ-

ees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

Unit clerical assistants, psychiatric aides, certified occupational therapist assistants, licensed vocational nurses, dietary employees, housekeeping employees, licensed psychiatric technicians, and maintenance employees; excluding business office clericals, teachers, marriage and family counselors, licensed clinical social workers, medical records clerks, professional employees, registered nurses, guards and supervisors as defined in the Act.

NEURO AFFILIATES COMPANY, A
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